Court of Appeals No. 56915-9-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington
v.
Michael Angel Amaro

Kitsap County Superior Court

Cause No. 21-1-00752-18

The Honorable Judge Jennifer Forbes

Appellant's Opening Brief

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INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Amaro's convictions were based on evidence seized in violation of the Fourth Amendment and Wash. Const. art. I, §7. A search warrant authorized police to search his entire smartphone for any data. The warrant was not supported by probable cause and did not particularly describe the areas of the phone to be searched and the information that could be sought.

The convictions must be vacated. The evidence must be suppressed, and the case remanded to the trial court.

At sentencing, the court improperly imposed vague and overbroad community custody conditions that are not sufficiently crime-related. In addition, the court inadvertently left in place a boilerplate provision requiring Mr. Amaro to pay supervision fees.

If the convictions are not vacated, the improper community custody provisions must be stricken. The case must be remanded so the court can impose proper conditions.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Amaro is a civilian who worked at the Puget Sound Naval Shipyard in Bremerton. CP 118. In September of

2021, he sat at a table in a drydock area, looking at his phone. RP (2/22/22) 45; CP 118. The shipyard is not open to the public, and has several areas that require specific security clearances. RP (2/22/22) 15, 38; CP 117.

Shipyard security came by and looked at his phone, which had a camera on it. RP (2/22/22) 44-45; CP 118, 138. In-phone cameras are not permitted at the shipyard. RP (2/22/22) 19-21, 39; CP 117, 138. The security officer took the phone. RP (2/22/22) 45-46; CP 118. Mr. Amaro willingly gave the officer his passcode. RP (2/22/22) 46; CP 118, 138.

The officer later spent time in her office reviewing the phone, looking at photos and over a dozen text streams. RP (2/22/22) 47-48. The phone was then given to the state patrol, who sought a warrant to search it. RP (2/22/22) 60; CP 119, 138. The affidavit indicated that officers were seeking evidence of Communication with a Minor for Immoral Purposes (CMIP) and first-degree child rape. CP 18, 119.

Although the affidavit was twelve pages long, only one-and-a-half pages outlined the facts supporting the request. CP

21-23. The specific data obtained from the phone consisted of a single text thread. CP 22.

Included in the text thread was an "image of a nude Caucasian female from the rear who was bent over facing away from the camera." CP 22, 119; RP (2/22/22) 48, 52. The warrant application did not suggest that the image was of a person under the age of 18. CP 22.

The text thread also included a message from an unknown sender. The message indicated that the sender was 11 years old and that they "wouldn't tell [their] mother they had sex." CP 22, 118-119. Although the affidavit referred to the sender using female pronouns, the text thread does not specify the sender's gender. CP 22, 118-119.

Based on this text thread, the court issued a warrant authorizing police to search for evidence of "Rape of a Child in the First Degree and… Communicating with a Minor for Immoral Purposes." CP 31. The warrant set forth 11 categories of information to be sought. CP 32-33.

First, the warrant authorized a search of the phone for "[e]vidence of other accounts… including email addresses,

social media accounts, messaging 'app' accounts, and other accounts that may be accessed… that will aid in determining the possessor/user of the device." CP 32.

Second, the warrant authorized police to search for evidence showing "use of the device to communicate with others with a sexualized interest in minors or others about the above-listed crime(s)… [and] other similar digital communications with minors that are for immoral purposes as defined by RCW 9.68A.090, to include all communications with a girl stating she is 11 years old and claimed to had [sic] recently met AMARO." CP 32. The warrant did not include any language limiting the phrase "immoral purposes" to communications related to sex. CP 32.

Third, the warrant authorized a search for evidence of the possessor's identity at the time that any "items of evidentiary value (user attribution evidence), located pursuant to this warrant were created, modified, accessed, or otherwise manipulated." CP 32. It described broad categories of data, including "electronically stored information from the digital

device(s) necessary to understand how the digital device was used, the purpose of its use, who used it, and when." CP 32.

Fourth, it allowed a search for "[v]isual depiction(s) of minor(s) engaged in sexually explicit conduct as defined by RCW 9.68A.011, in any format or media." CP 32. This was not one of the crimes identified as a target of the search. CP 31. Nor had officers described any images meeting that description. CP 31-33.

Fifth, the warrant permitted police to search for "[e]vidence of malware that would allow others to control the digital devices [sic] such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malware; as well as evidence of the lack of such malware." CP 32.

Sixth, it permitted officers to seek evidence that the phone was attached to "other storage devices or similar containers for electronic evidence and/or evidence that any of the digital devices [sic] were attached to any other digital device(s)." CP 32.

Seventh, it authorized a search for "[e]vidence of counter-forensic programs (and associated data) that are designed to eliminate data from a digital device." CP 32.

Eighth, it permitted police to search for "[e]vidence of times the digital device was used." CP 32.

Ninth, it allowed a search for "[e]lectronically stored information from the SUBJECT DIGITAL DEVICE(S) necessary to understand how the digital device was used, the purpose of its use, who used it, and when." CP 32.

Tenth, the police were authorized to search for information establishing the phone's position between August 7 and September 16, 2021, "including location data, cell tower usage; GPS satellite data; GPS coordinates for routes and destination queries between the above-listed dates; 'app' data or usage information and related location information." CP 33. It also allowed police to search for all "images [with metadata] created, accessed or modified" during the specified date range. CP 33.

Finally, the warrant permitted police to search for evidence regarding "the telephone number associated with the

seized phone, its service provider and all data used by a service provider to identify the phone, including the phones IMED [sic], MAC, and other unique identifiers." CP 33.

Although the warrant was based on a text exchange between Mr. Amaro and an unknown user, police did not describe any effort to identify that user. CP 21-23.

In their search of the phone, police found photos of minors engaged in sexually explicit conduct. CP 120, 139. The State charged Mr. Amaro with three counts of possessing a depiction of a minor engaged in sexually explicit conduct. CP 1-3. His attorney moved to suppress evidence from the phone, and the court held a hearing on the motion. CP 9-33, 95-102; RP (2/22/22) 3-90; RP (3/3/22) 4-27.

At the suppression hearing, the State called a witness to testify about security procedures in general at the shipyard. RP (2/22/22) 11-34. He said that he "assume[s]" every employee gets a copy of the employee handbook, which contains in-phone cameras on the list of prohibited items. RP (2/22/22) 23-25. He also said that when phones are seized, his staff uses their own discretion to look for photos or videos relating to classified

or sensitive information. RP (2/22/22) 29-30. The security person who seized and searched the phone also testified. RP (2/22/22) 37-56.

Mr. Amaro's counsel made several arguments in favor of suppression, including that the initial review of the phone exceeded its justifiable scope, that the text conversation could have been a part of a role-play and so did not amount to probable cause, and that the warrant was overbroad. RP (2/22/22) 64-69, 83; CP 9-17, 95-102.

The trial judge denied suppression in an oral ruling. RP (3/3/22) 4-29. The defense later provided supplemental authority supporting its motion to suppress, and the court again denied the motion. RP (4/11/22) 34-58. The court entered findings and conclusions in a written order. CP 116-126.

The court ruled that there was sufficient probable cause for the warrant, and that it was sufficiently focused on evidence of the crimes listed. CP 124-125.

The court also held that the warrant sufficiently defined the offense of communicating with minors for immoral purposes (CMIP), even though it did not include any reference

explaining that "immoral" communications related to sex. CP 125. Furthermore, the court decided that the authorization to search for evidence of CMIP could be severed if it were overbroad, so the remainder of the warrant would be valid. CP 125.

The state withdrew one of the counts of possessing child pornography. RP (4/11/22) 63; CP 127-129. Mr. Amaro waived his right to trial and the case was submitted to the court based on a stipulation signed by Mr. Amaro. RP (4/11/22) 63-71; CP 137-143. The court found Mr. Amaro guilty of two counts of possession of child pornography. RP (4/11/22) 71; CP 137-143.

Mr. Amaro had no criminal history, and he was sentenced within the standard range to 30 months incarceration. RP (5/9/22) 76; CP 144-145.

Without argument or comment, the Judgment and Sentence included several conditions of community custody. RP (5/9/22) 76-100; CP 146, 149. Among those were directives to avoid "sexually exploitive [sic] materials" as defined by his Community Corrections Officer (CCO), to avoid "sexually explicit materials," as well as to possess no "information

pertaining to minors" by computer or the internet. CP 149. In addition, the court ordered Mr. Amaro to "[h]ave no use of internet or Social Media without [treatment provider] and CCO's written approval." Appendix H filed 5/922, Supp. CP.

The court also left in place a boilerplate provision ordering Mr. Amaro to pay community custody supervision fees. CP 149; Appendix H filed 5/922, Supp. CP. In connection with this order, the court indicated that "[a]fter an individualized inquiry on the record… the Defendant has the current or future ability to pay" LFOs. CP 150.

Mr. Amaro timely appealed. CP 157.

ARGUMENT

I. BASED ON A SINGLE TEXT THREAD, AN OVERBROAD WARRANT AUTHORIZED POLICE TO SEARCH MR. AMARO'S ENTIRE SMARTPHONE FOR ANY DATA.

Based on a single text exchange, police were granted authority to search Mr. Amaro's entire cell phone. The brief text thread did not provide probable cause. Furthermore, the warrant failed to particularly describe the information sought and the "places" where it might be found on the phone. Mr.

Amaro's convictions must be vacated. The evidence must be suppressed, and the case remanded.

A. A search warrant must rest on probable cause and must particularly describe the information sought.

A search warrant can be overbroad "either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist." *State v. Gudgell*, 20 Wn. App. 2d 162, 180, 499 P.3d 229, 239 (2021) .

The probable cause and particularity requirements are "closely intertwined." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Together, they prohibit the "unbridled authority of a general warrant." *See Stanford v. State of Tex.*, 379 U.S. 476, 486, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545. In such cases, the particularity

requirement must "'be accorded the most scrupulous exactitude.'" *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485).

The need for heightened standards is especially acute where police seek authorization to search a cell phone. *See State v. Fairley*, 12 Wn.App.2d 315, 320, 457 P.3d 1150 *review denied*, 195 Wn.2d 1027, 466 P.3d 777 (2020). Cell phone searches "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) .

Cell phones "contain information touching on 'nearly every aspect' of a person's life 'from the mundane to the intimate.'" *Fairley*, 12 Wn.App.2d at 321 (quoting *Riley*, 573 U.S. at 393). Accordingly, "[a] cell phone search will 'typically expose to the government far *more* than the most exhaustive search of a house.'" *Id.* (quoting *Riley*, 573 U.S. at 396) (emphasis in original).

As the U.S. Supreme Court has observed, the vast quantity of data contained on a cell phone can expose all

aspects of a person's private life to government scrutiny. *Riley*, 573 U.S. at 393-398. First Amendment concerns demand a close examination of cell phone warrants to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

Furthermore, cell phones contain "intermingled information, raising the risks inherent in over-seizing data." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013). Accordingly, "law enforcement and judicial officers must be especially cognizant of privacy risks when drafting and executing search warrants for electronic evidence." *Id.*

The search warrant in this case authorized a search for materials protected by the First Amendment. *Fairley*, 12 Wn.App.2d at 323. The warrant is therefore subject to close scrutiny to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545. The warrant does not survive such an examination. *Perrone*, 119 Wn.2d at 545, 551-552. It permitted the officers to rummage through and seize

almost any data contained on the phone despite the absence of probable cause. In addition, the warrant failed to describe with particularity the information sought.

B. The single text exchange between Mr. Amaro and an unidentified party did not supply probable cause for police to search his entire phone.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552.

To establish probable cause, the warrant application "must set forth sufficient facts to convince a reasonable person of the probability… that evidence of criminal activity can be found at the place to be searched." *Lyons*, 174 Wn.2d at 359. By itself, an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64.

In addition, a search warrant must particularly describe the place to be searched and the things to be seized. U.S. Const. Amend. IV; Wash. Const. art. I, §7; *Perrone*, 119 Wn.2d at 545. In general, "a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits." *Id.*, at 547. Thus "a generic or general description may be sufficient, if probable cause is shown and a more specific description is *impossible*." *Id.* (emphasis added).

One purpose of the particularity requirement is to limit the discretion of executing officers. It "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Id.*, at 546. Specific descriptions ensure that officers search only for items supported by probable cause. *Id*.

Here, police purportedly sought evidence of first-degree child rape[1] and communication with a minor for immoral purposes (CMIP).[2] CP 18. The warrant rested on a brief text exchange referencing sex with a person who claimed to be an 11-year-old. CP 21-22. Included in the message thread was "an

[1] RCW 9A.44.073.

[2] RCW 9.68A.090.

image of a nude Caucasian female from the rear who was bent over facing away from the camera." CP 22. Nothing in the warrant application suggested that the photo was of a person under the age of 18. CP 21-22. The police did not describe any attempt to contact or identify the other party in the message thread. CP 21-22.

Based on this information, police sought and obtained permission to search the entire phone and seize information protected by the First Amendment. The warrant was overbroad: it allowed a search for information for which there was no probable cause.

It was also insufficiently particular in its descriptions of the data. It permitted police too much discretion in executing the warrant, allowing them to search for information wholly unrelated to evidence of any crime.

Evidence of other accounts. The single text exchange between Mr. Amaro and another person did not provide probable cause to believe that someone other than Mr. Amaro possessed or used the phone. Nothing in the affidavit suggested that anyone else had access to it. CP 21-22. Police did not

conduct any investigation to determine if others could use the phone.

Despite this, the warrant authorized police to search for any "email addresses, social media accounts, messaging 'app' accounts, and other accounts that may be accessed… that will aid in determining the possessor/user of the device." AP 32.

This provision is unsupported by probable cause and is insufficiently particular. All the material described is protected by the First Amendment. The list is overly expansive: it permitted police to conduct a broad-ranging search with little or no restrictions.

The provision did not accord "'the most scrupulous exactitude'" to the particularity and probable cause requirements. *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485). It is unconstitutionally overbroad.

Communications. The single message thread between Mr. Amaro and another unidentified person did not provide probable cause to search for communications with third parties. CP 21-22. Despite this, the warrant authorized police to search for evidence showing "communicat[ions] with others with a

sexualized interest in minors or others about the above-listed crime(s)…" CP 32.

In the absence of any information suggesting that Mr. Amaro communicated with others, the affidavit does not provide probable cause to search for evidence of such communications.

The same provision also directs police to search for "digital communications with minors that are for immoral purposes as defined by RCW 9.68A.090." CP 32. This provision is insufficiently particular because of the reference to "immoral purposes" without further elaboration.

The warrant's language does not limit the search to communications of a sexual nature, which is the essence of the offense.[3] *See State v. Schimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979) (discussing former RCW 9A.88.020). Absent such a limitation, the warrant was overbroad. It permitted police to search for communications between Mr. Amaro and any

[3] A statutory reference does not cure an overbreadth problem. *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). Furthermore, even if such a reference could cure the problem, it does not in this case because the statutory language does not define "immoral purposes," or limit the phrase to sexual matters.

minor, based on the officers' belief that the conversation related to "immoral" subjects.

Evidence of identity. The warrant authorized police to search for evidence of the user's identity at the time that "items of evidentiary value…located pursuant to this warrant" were created, modified, accessed, or manipulated. CP 32.

This description is insufficiently particular. It granted the executing officers too much discretion. The reference to evidence "located pursuant to this warrant" impermissibly bootstraps this provision to cover information located during the execution of the warrant. CP 32.

It also gave the officers the unfettered freedom to determine what qualifies as an "item[] of evidentiary value." CP 32. An expansive interpretation of this phrase could cover any information on the phone. Even a restrictive interpretation would cover information seized pursuant to the other overbroad provisions of the warrant.

Electronically stored information. The warrant permits a search for any "electronically stored information[4]… necessary to understand how the digital device was used, the purpose of its use, who used it, and when." CP 32. This provision appears twice in the warrant. It is also broad enough to cover another provision permitting a search for "[e]vidence of times the [phone] was used." CP 32 (*see* items 3, 8, and 9).

The affidavit does not supply probable cause to search for all evidence of how, why, when, and by whom the phone was used. CP 32. The authorization is broad enough to cover any use of the phone. It cannot rest on the brief text exchange outlined in the affidavit. CP 21-22.

In addition to the lack of probable cause, the provision is insufficiently particular. No attempt was made to limit the scope of any search. The language covers more than the communications, social media data, and similar items outlined elsewhere in the warrant. It also extends to such things as

[4] The provision also lists subcategories subsumed by this phrase, including "communications, photos and videos and associated metadata, documents, [and] social media activity." CP 32.

internet searches, navigation data, news consumption, purchase history, and any other use to which a smartphone can be put.

Child pornography. Nothing in the warrant application suggests that Mr. Amaro possessed child pornography.[5] The only potentially relevant image described by police was of a nude "female," with no allegation that she was underage. CP 21-22.

Accordingly, the affidavit did not supply probable cause to search for "[v]isual depiction(s) of minor(s) engaged in sexually explicit conduct…" CP 32. In the absence of probable cause, the warrant was overbroad.

Malware and security software. The text exchange outlined in the affidavit does not provide probable cause to search the phone for "the presence or absence of security software designed to detect malware." CP 32. Nor was there any basis to search for "malware that would allow others to

[5] Warrants targeting child pornography fall within the constitutional mandate against overbreadth. *Perrone*, 119 Wn.2d at 550. Even if ultimately determined to be illegal, the objects of such a search are presumptively protected by the First Amendment, and heightened standards apply. *Id.*, at 547, 550.

control the digital devices… [or] the lack of such malware." CP 32.

Furthermore, the warrant is insufficiently particular. It does not restrict the place to be searched for such evidence. Nor was there any limitation in the authorization to search for the presence or absence of security software and malware.

Such items would likely be found in a limited number of other places on a smartphone – places such as the operating system and security applications. As written, the authorization permitted police to search through any data on the phone to find malware, the absence of malware, security software, and the absence of security software.

Connection to other devices. The police sought evidence that the phone was attached to "other storage devices or similar containers for electronic evidence." CP 32. Nothing in the warrant application suggested that evidence of any crime could be revealed by showing that the phone had been attached to other devices. A single text with an unidentified person does not provide probable cause. Accordingly, the warrant was overbroad.

Counter-forensic programs. There was no suggestion in the affidavit that anyone had tried to "eliminate data" from the phone. CP 32. The data giving rise to the warrant consisted of a single text thread between Mr. Amaro and another person. The warrant application did not provide probable cause to search for "counter-forensic programs" that could be used to delete other data. Nor did the warrant particularly describe the places where such programs might be found on the phone. It permitted police to look anywhere on the phone under the guise of searching for counter-forensic programs. The warrant was overbroad.

Location data. The warrant permitted officers to search for information establishing the phone's position from August 7 through September 16, 2021. CP 33. This would allow police to track every movement made by Mr. Amaro, without any limitation, during a period that exceeded a month.

Nothing in the affidavit supplied probable cause for this information. Furthermore, the authorization is extraordinarily overbroad; it lacks any degree of particularity other than the lengthy date range. CP 33. It imposes no requirement that the location data be linked to any evidence of criminal activity.

All images and their metadata. Nothing in the affidavit provides probable cause to search for "images [with metadata] created, accessed or modified" during the specified date range. CP 33. The affidavit did not outline any information suggesting that photographs and associated metadata would provide evidence of any criminal activity.

Furthermore, even if the affidavit established that photographic evidence might exist, the description here was insufficiently particular. It placed no constraints on the authorization to search for images. The warrant would cover all photos and associated metadata, whether or not they were related to any criminal activity.

Summary. The warrant was overbroad. It was not supported by probable cause. It did not particularly describe the information sought or the places on the smartphone where such information might be found.

C. The warrant can't be saved under the severability doctrine.

Evidence may not be seized "by officers acting under the unbridled authority of a general warrant." *Stanford*, 379 U.S. at

481. The problem with a general warrant is that it permits "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *modified on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

The warrant here qualified as a general warrant. It permitted police to rummage through the entire phone without any restrictions. It allowed officers to search for any information, including data wholly unrelated to the crimes under investigation. It did not provide guidance to limit the discretion of the executing officers.

The trial court analyzed only one provision to determine if it could be severed from the remainder. CP 125. Specifically, the court found that language permitting a search for evidence of "communications with minors that are for immoral purposes" could be stricken without invalidating the remainder of the warrant. CP 32, 125. The court did not consider severing other parts of the warrant.

The warrant is not severable.

Under limited circumstances, courts may excise invalid parts of a warrant, allowing use of evidence seized under valid portions of the warrant. *Perrone*, 119 Wn.2d at 556. The doctrine may not be applied "where to do so would render meaningless the standards of particularity. *Id.*, at 558.

Furthermore, "where materials presumptively protected by the First Amendment are concerned, the severance doctrine should only be applied where discrete parts of the warrant may be severed, and should not be applied where extensive 'editing' throughout the clauses of the warrant is required to obtain potentially valid parts." *Id.*, at 560. Here, all the materials sought by police were protected by the First Amendment.

Severance cannot apply when the valid portion of the warrant is relatively insignificant. *Id.*, at 557. In this case, no part of the warrant is valid, as outlined above. If any portion were deemed valid, that portion would be relatively insignificant compared to the other provisions. This is so because each of the provisions, standing alone, would permit a search through the entire phone for a broad swath of data. *Id.*

In addition, severance cannot apply unless "a meaningful separation [can] be made of the language in the warrant." *Id,* at 560. In other words, "there must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability." *Id.*

Here, there is no meaningful, logical, or reasonable basis to divide paragraphs of the warrant that outline multiple types of information to be sought. For example, paragraph two authorizes a search for communications involving people who have "a sexualized interest in minors." CP 32. It also covers "communications with minors that are for immoral purposes." CP 32.

Similarly, paragraph three covers digital evidence of the user's identity. CP 32. It also covers any information "necessary to understand how the [phone] was used, the purpose of its use, who used it, and when." CP 32.

Paragraph five covers evidence of both malware and the absence of malware. CP 32. It also covers "evidence of the presence or absence of security software." CP 32. These provisions are not severable. For example, if the search for the

presence of malware or security software is valid, the paragraph cannot be separated to excise the portions authorizing a search for the *absence* of those items.

Paragraph 10 covers information that can be used to determine the location of the phone within a specified date range. CP 33. However, it also permits officers to search for and seize any "images created, accessed, or modified" during that timeframe. CP 33.

Such paragraphs are not discrete parts that can be severed from the warrant as a whole. Rather, each of these paragraphs targets more than one type of information. As in *Perrone*, dividing this warrant would be "strictly a pick and choose endeavor." *Id.*

The warrant is not severable. It is an overbroad general warrant. It cannot support the search of Mr. Amaro's smartphone.

D. The illegally seized evidence must be suppressed.

A conviction based on illegally seized evidence must be vacated. *State v. McKee*, 193 Wn.2d 271, 279, 438 P.3d 528

(2019). The remedy is to "remand to the trial court with an order to suppress." *Id.*

Mr. Amaro's conviction must be vacated. The Court of Appeals must remand his case to the trial court with an order to suppress the evidence. *Id.*

II. THE JUDGMENT AND SENTENCE INCLUDES VAGUE AND OVERBROAD CONDITIONS THAT ARE NOT SUFFICIENTLY CRIME-RELATED.

The sentencing court adopted conditions of community custody that were vague, overbroad, and insufficiently related to the circumstances of Mr. Amaro's crime. The case must be remanded to strike or clarify those provisions.

Due process requires "that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); U.S. Const. Amend. XIV. A prohibition "is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against

arbitrary enforcement." *State v. Sansone*, 127 Wn.App. 630, 638–39, 111 P.3d 1251 (2005).

In addition, any conditions "that impinge on a defendant's free speech rights… must be sensitively imposed in a manner that is reasonably necessary to accomplish essential state needs and public order." *State v. Johnson*, 4 Wn.App.2d 352, 358, 421 P.3d 969 (2018) (*Johnson* I) (internal quotation marks and citation omitted). A vague condition that infringes on "protected First Amendment speech can chill the exercise of those protected freedoms." *State v. Padilla*, 190 Wn.2d 672, 677–78, 416 P.3d 712 (2018).

A sentencing court has the power to impose "crime-related prohibitions." RCW 9.94A.703(3). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). This means that "a sentencing court may impose conditions reasonably related to the crime." *Johnson* I, 4 Wn.App.2d at 358 (internal quotation marks and citation omitted).

An offender may bring a pre-enforcement challenge to community custody conditions for the first time on appeal. *Bahl*, 164 Wn.2d at 744. Unlike statutory provisions, community custody conditions are not presumed to be valid. *Id.*

"Sexually exploitive [sic]" materials. The court prohibited Mr. Amaro from possessing or accessing "sexually exploitive [sic] materials (as defined by Defendant's… CCO[6])." CP 149, 241. This provision is unconstitutionally vague and infringes Mr. Amaro's First Amendment rights.

First, the phrase "sexually exploitive [sic] materials" is not defined anywhere in the Judgment and Sentence.[7] CP 144-156, 241. Nor is there a statutory definition upon which Mr. Amaro can rely. *Cf. State v. Nguyen*, 191 Wn.2d 671, 682, 425 P.3d 847 (2018) (phrase "dating relationship" is defined by statute); *but see State v. Perkins*, 178 Wn.App. 1024 (2013) (unpublished).

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[6] Community corrections officer.

[7] In addition, the provision's use of the word "exploitive" is questionable. *See Grammarist.com* (available at https://grammarist.com/spelling/exploitative-exploitive/, accessed 8/29/22).

The term "does not give ordinary persons fair warning of the proscribed conduct." *State v. Greenfield*, No. 82346-9-I, Slip Op. at *5 (Wash. Ct. App. Apr. 25, 2022) (unpublished) (addressing the phrase "known drug area.") Instead, it "is subject to broad interpretation." *Id.*

Second, permitting the CCO to define "sexually exploitive [sic] materials" invites arbitrary enforcement.[8] *See State v. Irwin*, 191 Wn.App. 644, 654, 364 P.3d 830 (2015) (citing *Bahl* and *Sansone*). A vague condition cannot be cured by delegating unfettered power of interpretation to the supervising officer. *Sansone*, 127 Wn.App. at 642. Such delegation permits enforcement "on an ad hoc and subjective basis." *Id.*

In addition, without further definition the prohibition infringes Mr. Amaro's First Amendment rights. *See, e.g., Bahl*, 164 Wn.2d at 757 ("pornography is protected speech while obscenity is not.") The definition must either reach only

[8] Mr. Amaro does not challenge restrictions imposed by his treatment provider. CP 149, 240-241.

unprotected speech (such as child pornography or obscenity)[9] or it must be sensitively imposed and limited to restrictions "reasonably necessary for public order or safety." *Johnson* I, 4 Wn.App.2d at 359.

The provision could be saved with "clarifying language or an illustrative list." *See Irwin*, 191 Wn.App. at 655. However, the court did not include clarifying language or an illustrative list. *Cf. State v. Wallmuller*, 194 Wn.2d 234, 245, 449 P.3d 619 (2019) (nonexclusive list clarifies the meaning of "places where children congregate.")

The case must be remanded for the sentencing court to strike the condition or clarify the restriction through additional language or an illustrative list of prohibited materials. *Id.; see, e.g., State v. Johnson*, 180 Wn.App. 318, 329, 327 P.3d 704 (2014) (*Johnson* II) (remanding to clarify or strike a community custody provision).

[9] The First Amendment does not protect libelous speech, fighting words, incitement to riot, obscenity, child pornography, and true threats. *State v. Homan*, 191 Wn.App. 759, 768, 364 P.3d 839 (2015), *as corrected* (Feb. 11, 2016).

Sexually explicit materials. The court prohibited Mr. Amaro from possessing or accessing "sexually explicit materials." CP 149, 241. This condition is improper. Although it is not unconstitutionally vague,[10] it is overbroad and unrelated to the circumstances of Mr. Amaro's crimes.

In *Johnson* I, the defendant was convicted of second-degree child molestation. *Johnson* I, 4 Wn.App.2d at 355. He was prohibited from possessing or viewing "images of nude women, men, and/or children…images of children wearing only undergarments and/or swimsuits… [and] material that shows women [and] men… engaging in sexual acts with each other, themselves, with an object, or animal." *Id.*, at 356.

The Court of Appeals found these prohibitions overbroad. *Id.*, at 359-360. It also determined that they were not crime-related. *Id.*

Here, the court prohibited Mr. Amaro from possessing or accessing any "sexually explicit materials." CP 149, 241. The prohibition does not exempt adult pornography, works of art, or other items of cultural significance. CP 149, 241.

[10] *See Nguyen*, 191 Wn.2d at 681.

The condition is overbroad. *Id.,* at 359. It "encompass[es] broad swaths of materials with significant social value." *Id.* As in *Johnson* I, "[t]here is no indication that such a broad prohibition on constitutionally-protected materials is reasonably necessary for public order or safety." *Id.*

In addition, the prohibition is not crime-related. Mr. Amaro has not been convicted of any offense involving adult pornography or other materials that would fall within the prohibition. Thus, there is "no connection in the record between [Mr. Amaro's] offense conduct and the type of materials" prohibited by this condition. *Id.*

The case must be remanded for the trial court to revise the prohibition on sexually explicit materials to ensure it is narrowly tailored and crime-related. *Id.*

Information pertaining to minors. The court prohibited Mr. Amaro from possessing or accessing "information pertaining to minors via computer (i.e. internet)." CP 149, 241. No limitation was placed on this condition. CP 149, 241.

The phrase "information pertaining to minors" is unconstitutionally vague and overbroad.[11] Furthermore, it imposes restrictions that are not crime-related. *See State v. Eckles*, 195 Wn.App. 1044, ___ (2016) (unpublished)

Although it appears in a paragraph referencing "sexually explicit materials," the paragraph is phrased in the disjunctive, restricting Mr. Amaro from *any* information relating to minors. CP 149, 241. The "grammatical structure is not such that 'sexually explicit' modifies the term[]… 'information pertaining to minors.'" *Id.*, at ___ (unpublished).

Under this provision, Mr. Amaro will not be able to look up scores relating to a high-school sports team. Nor will he be allowed to access "a news article related to a disease outbreak among children." *Id.* (unpublished).

The blanket prohibition on "information pertaining to minors" is not "sensitively imposed in a manner that is reasonably necessary to accomplish essential state needs and

[11] A restriction on "information" necessarily implicates First Amendment rights.

public order." *Johnson* I, 4 Wn.App.2d at 358 (internal quotation marks and citation omitted).

Furthermore, the prohibition "cannot be defined with sufficient definiteness that ordinary people can understand what conduct is proscribed and does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Eckles*, 195 Wn.App. at ___ (unpublished).

The provision is vague, unconstitutionally overbroad, and unrelated to the circumstances of Mr. Amaro's crime. The case must be remanded with instructions to strike the condition. *Id.*

Internet access. The court prohibited Mr. Amaro from having "use of internet or Social Media without SOTP and CCO's written approval." Appendix H filed 5/9/22, Supp. CP. The prohibition is unconstitutionally overbroad and is not crime-related.

Restrictions on internet access "have both due process and First Amendment implications." *State v. Johnson*, 197 Wn.2d 740, 744–45, 487 P.3d 893 (2021) (*Johnson* III) (citing *Packingham v. North Carolina*, ––– U.S. ––––, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017)). Any restriction "must be

narrowly tailored to the dangers posed by the specific defendant." *Id.*

In *Packingham,* the defendant was statutorily prohibited from using social media following a conviction for indecent liberties of a child. *Packingham,* --- U.S. at ___. The Supreme Court described the prohibition against social media use as "unprecedented in the scope of First Amendment speech it burdens." *Id.* It invalidated the statute. *Id.*

A community custody condition restricting internet use may also be invalid. *Matter of Sickels*, 14 Wn.App.2d 51, 73, 469 P.3d 322 (2020). The *Sickels* court found a provision limiting internet use to employment purposes "overly broad." *Id.* This was so even though the defendant in that case used the internet to perpetrate his sex crime. *Id.* Furthermore, the court noted, delegating authority to a CCO "does not solve the problem, [because] a sentencing court may not wholesalely [sic] abdicate its judicial responsibility for setting the conditions of release." *Id.*

Johnson III presented similar circumstances; however, the sentencing court imposed an appropriate restriction. In

Johnson III, the defendant used the internet in an attempt to commit child rape. The Supreme Court endorsed a condition requiring the defendant to use a CCO-approved filter to access the internet. *Johnson* III, at 745-747. The court found the filter requirement "significantly narrower than the statute struck in *Packingham*." *Id.* Even so, the court noted, an "overzealous filter might violate the First Amendment." *Id.,* at 746.

The failure to use a filter can invalidate an otherwise-appropriate internet restriction. *State v. Geyer*, 19 Wn. App. 2d 321, 330, 496 P.3d 322 (2021). As in *Johnson* III, the defendant in *Geyer* "used the Internet to commit his crime." *Id.* However, instead of "temper[ing] [the restriction]… by the use of a filter," the court ordered that the defendant's internet use be preapproved by his CCO and treatment provider. *Id.,* at 328-329. The *Geyer* court struck this provision but reaffirmed that "[t]he use of a filter, tailored to [the defendant's] risk to the community, would be a sufficiently narrow way to fulfill the State's goals." *Id.* (footnote omitted).

In this case, as in *Geyer*, the court required Mr. Amaro to obtain written approval from his CCO and treatment provider

before he could access the internet. Appendix H filed 5/9/22, Supp. CP. No exception was made for employment-related internet use or for other uses necessary for his successful return to the community.

The restriction was unconstitutionally overbroad. *Id.* Furthermore, even assuming Mr. Amaro used the internet in the commission of his crimes, the breadth of the provision makes it insufficiently crime-related. *Id.* It must be stricken, and the case remanded. *Id.* On remand, the sentencing court must consider whether a sensitively-imposed restriction, narrowly tailored to Mr. Amaro's risk, is necessary.

III. THE COURT OF APPEALS SHOULD STRIKE A CLERICAL ERROR DIRECTING MR. AMARO TO PAY THE COSTS OF SUPERVISION.

At sentencing, the prosecuting attorney did not ask the court to impose more than the minimum amount of legal financial obligations required by law. RP (5/9/22) 77. The sentencing judge did not make an individualized inquiry into

Mr. Amaro's financial circumstances before imposing sentence.[12] RP (5/9/22) 76-89.

In sentencing Mr. Amaro, the court said "I'm going to impose the standard financial obligations." RP (5/9/22) 94. The court imposed only mandatory LFOs. CP 150.

Despite this, the court left in place a boilerplate provision directing Mr. Amaro to "Pay DOC monthly supervision assessment." CP 149, 241. This boilerplate provision was buried in the densely worded "Supervision Schedule" on page six of the Judgment and Sentence and in Appendix H. CP 149; Appendix H filed 5/9/22, Supp. CP.

Under these circumstances, it is "abundantly clear" that the court meant to strike boilerplate provisions imposing supervision fees. *Geyer*, 19 Wn.App.2d at 332. Accordingly, the Court of Appeals should either strike the provision or remand with instructions to correct the clerical error. *Id.*

[12] The Judgment and Sentence indicates that the court made "an individualized inquiry on the record" and found that Mr. Amaro "has the current or future ability to pay legal financial obligations." CP 150. This finding is unsupported and must be stricken.

CONCLUSION

The evidence against Mr. Amaro was illegally obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7. His convictions must be vacated, and the evidence suppressed.

If the convictions are not vacated, the case must be remanded to address sentencing errors. The court imposed improper community custody conditions and inadvertently failed to strike a provision requiring Mr. Amaro to pay the costs of supervision.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 7420 words, as calculated by our word processing software.

Respectfully submitted on September 3, 2022,

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Michael Amaro DOC# 432143
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on September 3, 2022.

_____

Jodi R. Backlund, No. 22917
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BACKLUND & MISTRY

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